October 18, 2017

Headquarters, U.S. Army Corps of Engineers
Attn: CECW-CO-N (Ms. Mary Coulombe)
441 G Street N.W.
Washington, D.C. 20314-1000


Dear Ms. Coulombe:

The American Gas Association (AGA) provides these comments in response to the U.S. Army Corps of Engineers’ (Corps) above-captioned request for input from significantly affected entities regarding existing Corps regulations that may be appropriate for repeal, replacement or modification. The Corps has explained it is undertaking this regulatory review pursuant to Executive Order 13777, “Enforcing the Regulatory Reform Agenda” (Feb. 24, 2017).

AGA and its member companies are significantly affected by the Corps’ existing regulations under the Clean Water Act. We have consistently advocated for sensible Corps regulations that protect the environment and water resources efficiently, while expediting infrastructure projects needed to deliver natural gas to commercial and residential customers safely, reliably and affordably. For this reason, we are pleased that the Corps recently reissued its streamlined nationwide permit (NWP) program under Clean Water Act section 404, including several NWPs that our members rely on to serve their customers. In our past NWP comments, we have suggested ways to improve the program, and we appreciate the Corps’ decision to accept some of our suggested changes. We welcome this opportunity to take a fresh look at the Corps’ existing regulatory programs to suggest additional improvements that could achieve the Corps’ environmental mission in a manner that uses the Corps’ resources more efficiently and reduces costs and delays for essential energy infrastructure projects.
AGA represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 73 million residential, commercial and industrial natural gas customers in the U.S., of which 95 percent — more than 69 million customers — receive their gas from AGA members. AGA is an advocate for natural gas utility companies and their customers and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international natural gas companies and industry associates. Today, natural gas meets more than one-fourth of the United States’ energy needs.

Our member natural gas utility companies operate systems of local distribution mains and service lines that typically deliver natural gas to homes, small businesses, big box stores, hospitals, nursing homes, schools, college dormitories, and small industrial facilities. Some also deliver natural gas to gas-fired electric generating plants. Our members receive their natural gas supply from interstate natural gas transmission pipelines and local production.

A critical difference between these local distribution systems and interstate natural gas transmission pipelines is often overlooked when evaluating how to streamline federal environmental permit programs. Unlike interstate pipelines, AGA member natural gas distribution systems are entirely intra-state and thus are not regulated by the Federal Energy Regulatory Commission (FERC). Instead, the state public utility commission in each state regulates the rates, capital investments, and operations and maintenance expenditures of local distribution utilities located within the state. This means FERC’s process for coordinating and streamlining environmental and cultural resources permitting applies only to interstate natural gas transmission pipelines that are subject to FERC jurisdiction under the Natural Gas Act. FERC’s permit coordination and streamlining process does not apply and is not available to intra-state natural gas distribution systems. Therefore, in these comments, while AGA supports changes that can expedite FERC-regulated interstate pipelines that supply natural gas to our members, AGA will mainly focus on changes the Corps could make that would help expedite the Corps’ permitting for our members’ natural gas utility projects that are not governed by the FERC process.

AGA supports Interstate Natural Gas Association of America’s (INGAA) October 18, 2017 comments filed in this docket regarding steps INGAA recommends to improve the efficiency and effectiveness of the Corps’ regulatory programs under the Clean Water Act (CWA) to protect the nation’s waters while eliminating unnecessary delays or restrictions for natural gas pipeline infrastructure.

First, we support INGAA’s recommendations that relate solely to the Corps’ coordination with the FERC review process, because these changes can help expedite interstate pipelines that provide critical natural gas supplies to our members. The availability of supply, particularly in the winter when heating demand peaks, is critical for maintaining affordable energy costs. There is abundant supply of natural gas in this country due to the revolution in shale gas production. This abundance has resulted in
stable, low natural gas prices in areas of the country that have sufficient access to natural gas pipeline supplies. But in some areas of the country, particularly in the Northeast, pipelines have been delayed and blocked, resulting in supply bottlenecks and price increases in the winter when heating demand peaks. These bottlenecks are the result of permitting inefficiencies. While pipeline opponents use many strategies, the Corps’ permit process is one of their favored tools. The Corps can help remove some of these barriers by adopting INGAA’s recommendations, including two that relate solely to the FERC process: (1) Increase collaboration with FERC and defer to FERC’s review process to the maximum extent allowed by law; and (2) Issue CWA section 404 permits contingent upon FERC’s successful compliance with the National Historic Preservation Act (NHPA) when FERC is the lead agency.¹

Second, we support INGAA’s other recommendations for improving the Corps’ regulatory program that are not restricted to the FERC process, because these changes could help expedite permits not only for interstate pipelines, but also for our members’ intrastate natural gas utility projects. In the following comments, AGA explains how these and other regulatory reforms could expedite natural gas utility projects to help provide safe, reliable, affordable natural gas to U.S. homes and businesses, while also protecting the environment, water resources and cultural resources.

I. AGA urges the Corps to Simplify the NWP Process on a National Level and Across All Corps Districts so that NWPs Are Reliably Available to Expedite Natural Gas Utility Projects that Have Minimal Impacts

A. NWPs Are Essential for Maintaining and Operating Natural Gas Utility Infrastructure

The Nationwide Permit (NWP) Program is essential to facilitate timely energy infrastructure projects so that natural gas utilities can continue to provide safe, reliable transportation of cleaner burning natural gas to businesses and residences. AGA members rely on nationwide permits to perform regularly scheduled, time-sensitive repair and maintenance work, bank stabilization, removal of retired pipelines, and for various types of intrastate pipeline construction projects including new transmission and pipeline expansion.

Natural gas intrastate transmission pipelines can extend many miles within a single state, and will likely have to cross short segments of streams, wetlands and other jurisdictional waters. Where feasible, utilities will take steps to avoid stream and wetland crossings. However, when this cannot be accomplished and crossing is required, natural gas utility projects are narrow, linear and usually have minimal temporary impacts on aquatic resources. Crossings often can be completed within a few days, and the narrow

¹ See INGAA Oct. 18, 2017 Comments filed in this docket (INGAA Comments), at pp. 2, 3-4, 13.
linear footprint of the project minimizes impacts to a few yards. Natural gas utilities implement best management practices to minimize sedimentation and to restore the crossing site to its prior condition, grading and vegetation. Natural gas utility projects are also subject to a myriad of other federal, state and local regulations. The end result is that natural gas utility projects usually have minimal, temporary environmental impacts and are the perfect candidate for nationwide permits.

Utilities, their state commissions, and PHMSA have targeted aging cast iron, unprotected steel and vintage plastic distribution pipe for accelerated replacement in order to modernize natural gas distribution systems and enhance pipeline safety. These projects often entail the use of NWPs. In addition to improving pipeline safety, they have contributed significantly to a declining trend in emissions from the natural gas system. The April 2017 Environmental Protection Agency (EPA) Inventory showed that natural gas emissions from local distribution systems in the U.S. decreased by an impressive 75 percent from 1990 to 2015. EPA’s Inventory and the voluntary Natural Gas STAR program attribute much of this decrease to the industry’s continued work to replace aging distribution pipelines. Much of this important work is authorized by NWPs.

In Corps districts where NWP’s are unduly restricted, natural gas utilities may be forced to seek an individual permit for projects that actually have minimal impacts on jurisdictional aquatic resources. This diverts resources that could otherwise be used to replace more pipe on a faster schedule. It also places an unnecessary administrative burden on the Corps. As recognized by the Supreme Court in *Rapanos v. United States*, a permit applicant will on average spend more than twice as long, 788 days as compared to 313 days, and nearly ten times as much money, $271,596 compared to $28,915, obtaining an individual permit compared to obtaining a NWP. AGA’s members confirm these estimates match their experience. For natural gas utilities, where approved by local or state utility commissions, these costs are borne by consumers. As a result, the increased costs associated with processing permits could be passed onto the consumer, with no appreciable environmental benefit. Or the increased paperwork processing costs will reduce the funds that the utilities can devote to pipe replacements and other needed infrastructure improvements.

Earlier this year, the Corps wisely decided to reissue the NWP program. However, there remain several unnecessary restrictions on the availability of NWPs, which we ask the Corps to review and revise, as explained below.

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B. AGA Agrees with INGAA that the Corps Should Reduce Inconsistencies in Regional Conditions and Ensure NWPs are Consistently Available in All Districts

Regional conditions are intended to allow a Corps District office to restrict activities authorized by NWPs where necessary to prevent significant impacts that otherwise could arise due to unique local environmental conditions. This is an understandable and useful tool for tailoring the nationwide program to ensure that NWPs indeed authorize projects that have minimal impacts. But we agree with INGAA’s comments in this docket that some Districts have imposed broadly worded or blanket regional conditions that exceed the purpose of protecting specific resource types or geographical areas. These excessive regional conditions conflict with the NWP program goal “to provide timely authorizations for the regulated public while protecting the Nation’s aquatic resources.”

Like INGAA’s members, AGA’s gas utility members have also encountered inconsistent regional requirements for pre-construction notifications (PCN). Some Districts have imposed blanket regional conditions requiring utilities and pipeline operators to submit pre-construction notifications (“PCN”) for any use of NWP 12. This practice has seriously delayed interstate and intrastate natural gas pipeline construction projects as well as distribution pipe replacement and maintenance needed to provide safe, reliable and affordable natural gas to customers in the affected regions.

In addition, AGA members have encountered difficulties similar to those of INGAA’s pipeline members in Corps districts that irrationally bar the use of NWP 3 to repair and maintain pipeline and distribution infrastructure. Instead, these Districts require our members to use NWP 12, which authorizes new construction. There is no rational reason not to use NWP 3 for its intended purpose – for “repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure.” By requiring the use of NWP 12 instead of NWP 3 for maintenance projects, these Districts may force the applicant to provide a PCN, which can prevent the utility from beginning the maintenance and repair activity for at least 30 days and drain resources that could otherwise be devoted to additional projects to improve natural gas delivery infrastructure.

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4 NWP 12 only requires a PCN where “(1) The activity involves mechanized land clearing in a forested wetland for the utility line right-of-way; (2) a section 10 permit is required; (3) the utility line in waters of the United States, excluding overhead lines, exceeds 500 feet; (4) the utility line is placed within a jurisdictional area (i.e., water of the United States), and it runs parallel to or along a stream bed that is within that jurisdictional area; (5) discharges that result in the loss of greater than 1/10-acre of waters of the United States; (6) permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet; or (7) permanent access roads are constructed in waters of the United States with impervious materials.” 82 Fed. Reg. at 1,986.
5 82 Fed. Reg. at 1,984.
AGA supports the recommendations made in INGAA’s comments⁶ that the Corps should promote uniformity and consistency in standard regional conditions by requiring districts to explain to headquarters the reasoning for any existing or proposed regional conditions, and the Corps should approve only those conditions that headquarters agrees are necessary to protect the relevant regional jurisdictional resource, such as protected species or high quality or critical resource waters. It may be helpful for Corps headquarters to provide guidance to the districts that would limit the scope of regional conditions that District Engineers may impose. The guidance should also require that case-by-case conditions be tailored to protect specific regional resources based on documentation in the record. In addition, the lack of an online database of regional conditions for each district may have contributed to a lack of transparency and consistency in the past. We agree with INGAA that the Corps should maintain an online database of regional conditions for each district both so that headquarters can ensure consistency with the goals of the NWP program and so that applicants can better anticipate and track changes in regional conditions, to help them plan their projects.

C. The Corps should Revise NWP 12 or General Condition 18 to Eliminate Excessive PCNs Whenever a Listed Species “Might” be “In the Vicinity”

Under the Obama Administration, the U.S. Fish and Wildlife Service (FWS) designated large swaths of land as areas where endangered species “might” occur. For example, the Indiana Bat is listed as endangered and its habitat covers broad swaths of numerous states east of the Mississippi River. For the Indiana Bat and other species with similarly broad habitat ranges, it is unclear whether these designated habitat areas would be considered “in the vicinity” of an activity. This uncertainty could lead project proponents to always submit a PCN, whether truly warranted or not, to reduce regulatory risk. As noted above, submitting a PCN is not an insignificant task, especially given the minimal adverse environmental impacts associated with linear energy projects eligible for NWPs. Requiring a PCN for all listed species that may be in the vicinity of a project frustrates the purpose of the NWP program to streamline projects that have minimal adverse environmental effects. In addition, the required “mitigation” for these impacts would likely need to be located in areas outside the vicinity of the activity, which would be inconsistent with the Corps’ position that its jurisdiction is limited to the activity and the limited area surrounding it.

This could prove especially problematic for activities authorized under NWP 12 – Utility Lines, that have the potential to be quite lengthy, and could be “in the vicinity” of

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⁶ See INGAA Comments, pp. 6-7.
numerous species. AGA encourages the Corps to recognize the limited environmental impact of natural gas utility projects and revise either NWP 12 or General Condition 18 to ensure that the term “in the vicinity” does not require excessive PCNs to the point of frustrating the use of NWP 12.

AGA urges the Corps to clarify that that PCNs should only be required when the FWS has identified critical habitat that could be affected by the activity.

D. AGA Supports INGAA’s Recommendation for a Blanket NWP Notification Similar to FERC’s Blanket Certification

For the reasons stated in INGAA’s comments, AGA agrees that for a subset of small natural gas pipeline and utility projects, pre-construction notifications are not necessary and impose administrative burdens on applicants and the Corps that exceed any environmental benefits. We are intrigued by the idea of creating a blanket program similar to the FERC blanket certificate process which would call on applicants to submit an annual post-construction notification for small projects performed under the NWP program during the preceding year. The Corps could establish criteria for qualifying for this blanket notification process. We urge the Corps to consider this innovative approach and to make it available for intrastate natural gas utility projects as well as FERC-regulated interstate pipelines. This would help reduce unnecessary costs and delays for infrastructure projects with minimal impacts, while freeing the Corps’ resources to focus on larger more impactful projects.

E. The Corps Should Provide a Streamlined Method to Authorize Emergency Work and Time-Sensitive Utility and Pipeline Safety Inspections

It is long past time for the Corps to provide an effective NWP to authorize emergency and time-sensitive pipeline safety work, including time-sensitive natural gas pipeline and distribution system integrity testing and inspections. Over a decade ago, the Corps created an NWP specifically to authorize emergency and time-sensitive projects needed for pipeline integrity and safety. However, the NWP was contingent on the DOT PHMSA’s development of an online tool to help track and coordinate federal and state permits necessary to authorize work required to comply with PHMSA’s pipeline and distribution integrity management plan rules, known as TRIMP and DIMP. Unfortunately, PHMSA’s online tool was not finalized, and the Corps subsequently

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7 See INGAA Comments, pp. 9-10.
deleted the emergency and time-sensitive NWP as a dead letter. The Corps never took steps to replace it.

Urgent natural gas pipeline and distribution safety and integrity inspection work should not be delayed by an unnecessary bureaucratic process. AGA urges the Corps to provide an NWP to authorize emergency and time-sensitive pipeline and utility safety work and inspections on an expeditious basis, and we commend INGAA’s idea for using a new blanket NWP and annual post-work notification process to address this need.8

F. The Corps Should Increase NWP Acreage Limitations and PCN Thresholds

In the recent NWP reissuance in January 2017, the Corps considered but did not implement an increase in acreage limitations and PCN thresholds for the NWPs critical for our member’s projects as AGA requested. The Corps now has an opportunity to reconsider. AGA encourages the Corps to increase the acreage limitations and PCN thresholds for NWPs, and especially those NWPs that play a critical role in energy infrastructure projects: NWP 12 – Utility Line Activities and NWP 13 – Bank Stabilization. These NWPs are necessary for the timely and efficient permitting of natural gas utility projects intended to rejuvenate aging infrastructure and respond to the multitude of regulatory requirements related to improving pipeline safety.9 By increasing the acreage limitations and PCN thresholds for these NWPs, the Corps would be fulfilling the Congressional mandate to streamline the permit process for projects that have minimal adverse environmental effects, while simultaneously advancing the Trump Administration’s goal to expedite and reduce barriers to natural gas and other energy infrastructure projects. Increasing the disturbance threshold associated with NWP 13 – Bank Stabilization to exceed the 500 linear foot and one cubic yard per running foot below the ordinary high water mark limitations would be particularly useful. By expanding the thresholds and allowing a single NWP to cover a larger project, a more comprehensive project can be undertaken to stabilize banks in a preventive manner.

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8 See INGAA Comments, pp. 8-9. We also agree that the California Corps District in Los Angeles has a useful Regional General Permit that could serve as a model for authorizing natural gas pipeline and utility emergency maintenance and repair work. This is also true for the Sacramento and San Francisco Districts. However, while these Regional General Permits cover emergency work, they do not address time-sensitive integrity testing and repairs required to comply with pipeline safety requirements. A consistent national solution is needed for both emergency work and time-sensitive integrity testing and repairs.

As the Corps considers increasing the PCN thresholds, AGA encourages the Corps to consider that pre-construction notification is no small task. The materials and information required to be provided in a PCN are substantial and require significant effort. Many times, the field surveys required by PCNs can only be conducted during growing seasons, which limits when these surveys can be conducted and can significantly delay a project or add significant time to the pre-construction process.

Furthermore, if the PCN is submitted under a specific General Condition, the Corps may not be subject to any time limit associated with reviewing the PCN. The time-sensitive nature of some utility projects, whether related to other regulatory requirements or contractual obligations with the customer, does not always allow sufficient time for seasonal restrictions on pre-construction field work, leading to delays that compromise the safe, reliable and timely delivery of natural gas to residential, commercial and industrial customers. Taken as a whole, the obligation to submit a PCN is not insignificant. The PCN can delay projects and require additional resources to gather the requisite substantive information.

AGA urges the Corps to establish PCN thresholds that are consistent with the minimal adverse impacts associated with utility line projects and the purpose of the NWP program to streamline the permitting process.

II. The NHPA 106 Historic Preservation Review Process and Deadlines Should be Clarified to Prevent Unnecessary Project Delays

A. The Corps Should Adopt Guidance Directing Districts to Implement Clear Deadlines for NHPA Section 106 Historic and Cultural Resource Reviews

In many instances, AGA members have encountered delays and an unpredictable process for obtaining tribal and state historic preservation reviews under section 106 of the National Historic Preservation Act (NHPA) for intrastate utility projects authorized by NWPs as well as individual CWA 404 permits. This appears to be due to a lack of clear deadlines and expectations. One district working with an AGA member utility in the Northeast has developed a flow chart to help provide clear deadlines the NHPA 106 review process. The district and the utility have found the flow chart has helped to reduce delays while providing clear, robust opportunities for the necessary historic and cultural reviews. This could provide a useful template for a national guidance to districts. AGA urges the Corps to consider adopting guidance directing all districts to implement a similar flow chart and enforce clear deadlines for the NHPA section 106 review process.
B. For Interstate Pipelines, the Corps Should Authorize the Use of NWPs and Issue CWA 404 Individual Permits Contingent on the Completion of the FERC NHPA 106 Process.

For the reasons stated in INGAA’s comments, AGA agrees that the Corps should issue CWA section 404 permits and authorize the use of NWPs contingent upon FERC’s successful compliance with NHPA, rather than postponing its authorization until FERC provides notification that NHPA consultation is complete. It is important to AGA’s utility members that natural gas interstate pipelines are authorized, constructed and maintained on a timely basis to ensure they can deliver supply to our members so that they in turn can deliver natural gas to customers – particularly in the peak winter heating season – safely, reliably and affordably.

III. The Corps Should Clarify That the CWA Section 401 Review Process Starts Upon the State’s Receipt of the Original Written Request for a CWA Section 401 Water Quality Certification and Enforce Existing Regulations That State Waiver Will Occur Unless the Certifying Agency Acts Within 60 Days.

AGA agreed with INGAA that the CWA section 401 certification requirements are creating enormous regulatory and commercial burdens for natural gas pipeline and utility projects when misused by States for reasons other than protecting water quality. We urge the Corps to take active measures to reduce these burdens, as recommended in INGAA’s comments.

IV. The Corps Should Provide Consistent Procedures to Engage Section 408 Personnel Earlier in the Section 404 Permit Process and Coordinate the Reviews to Prevent Unnecessary Delays

AGA agrees with INGAA’s comments that greater coordination is needed between the section 408 program personnel when a natural gas pipeline project needing a NWP or individual CWA section 404 permit will affect a Corps Civil Works project. Under section 14 of the Rivers and Harbors Act (“RHA”) (33 U.S. Code section 408), the Corps may permit private entities to make a permanent or temporary alteration or use of Corps civil works projects, provided the alteration “will not be injurious to the public interest and will not impair the usefulness of such work.” 33 U.S.C. § 408(a). Like INGAA’s interstate pipeline members, AGA’s natural gas utility members must obtain a Corps section 408 authorization in situations where their intrastate transmission

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10 See INGAA Comments, pp. 11-13.
11 See INGAA Comments p. 11.
12 See INGAA Comments, pp. 4-5.
or distribution pipeline will cross a Corps public work, such as a bridge, dam, levee or
dredged channel. This can be a very frustrating and unpredictable endeavor, because
the Corps has not provided a clear process for applicants to follow in applying for a 408
authorization. AGA members have reported instances when their NWPs for utility
projects with minimal environmental impacts have been delayed for many months
because the 408 personnel did not begin reviewing the project early enough and
miscommunicated or changed their mind regarding what documentation they needed to
complete their review.

AGA is encouraged that the Corps has announced plans to update and clarify the
section 408 process. We support and urge the Corps to adopt INGAA’s
recommendations to ensure that the 408 process does not unduly impede natural gas
transmission and distribution pipeline infrastructure installation, replacement and
maintenance.

V. The Corps Should Clarify that a Permittee May Purchase Mitigation Bank
Credits and that Permittee-Responsible Mitigation is Not the Only Option
When Some Impacts Extend Beyond a Bank’s Service Territory

For the reasons stated in INGAA’s comments, AGA agrees the Corps should
amend the mitigation rule or issue guidance clarifying that project sponsors of linear
energy projects have the option to purchase mitigation bank credits rather than having
to provide permittee-responsible mitigation when compensating for permitted impacts
that may extend beyond the service area of a particular mitigation bank.

VI. AGA Supports the Corps’ Initiative to Repeal and Replace the 2015 Rule
Defining Waters of the United States

AGA has long sought a clear regulatory definition of the waters that are subject to
federal jurisdiction under the Clean Water Act. For planning, our members need to
know when their projects affect “waters of the United States” (WOTUS) without the risk
of being second-guessed in a subjective, case-by-case decision process. This is
important to AGA members because the scope of WOTUS affects the scope of their
natural gas utility projects that may be deemed to require CWA section 404 permits. By
2015, the Corps’ guidance had expanded the reach of federal jurisdiction beyond the

13 See http://www.usace.army.mil/Missions/Civil-Works/Section408/.
14 See INGAA Comments, p. 14. AGA also notes that some Districts have explored methods for improving the
section 408 process that headquarters may find helpful as models. For example, the Sacramento Corps District in
California has proposed Categorical Permissions for several types of public works alterations, including “pipes” and
“utility poles.” We hope that further efforts to clarify and streamline the 408 and 404 process continue and
become more uniformly available on a national level.
15 See INGAA Comments, pp. 11-13.
traditional scope of WOTUS and caused considerable confusion and inconsistent jurisdictional determinations. AGA joined with others in the regulated community to urge the Corps to provide greater clarity through a revised regulatory definition.

Unfortunately, the revised rule adopted by the Obama Administration in 2015 increased rather than decreased confusion regarding what is or is not a federal water of the United States. 80 Fed. Reg. 37,054 (June 29, 2015) (“2015 WOTUS Rule”).

We therefore support the Corps’ and EPA’s joint proposal to withdraw the 2015 WOTUS Rule and initiate a notice and comment rulemaking in a transparent process, seeking robust input from affected stakeholders, in order to develop a regulatory definition that finally does provide greater clarity.

AGA appreciates the opportunity to comment. If you have any questions, please contact me.

Respectfully Submitted,

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